IN THE

Supreme Court of the United States

No. 76-835

UNITED STATES OF AMERICA,

Petitioner,

v.

NEW YORK TELEPHONE COMPANY,

Respondent.

BRIEF FOR NEW YORK TELEPHONE COMPANY

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Preliminary Statement

Respondent New York Telephone Company is pleased that the Court has granted *certiorari* to provide guidance and resolve the conflict that now exists as to the responsibility of telephone companies when law enforcement authorities seek to use devices which are still somewhat euphemistically, and certainly archaically, referred to as "pen registers"* for investigatory purposes and to require telephone company assistance through the provision of facilities and technical assistance, where such authorities do not proceed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510, et seq.).

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* See footnote 2, *infra*.

Respondent has no desire to obstruct law enforcement authorities in the carrying out of their vital functions. Indeed, it is desirous of cooperating to the extent this Court or Congress deems it to be in the public interest. At the same time, it has a long-standing policy of fostering the privacy of communications. Protection of this privacy is fundamental to the telephone business. It is also required by statutory and decisional law, with limited exceptions in the interest of national security and the enforcement of the criminal law.

After forty years of wrestling with the problem by courts and legislative bodies, beginning with *Olmstead* v. *U.S.*, 277 U.S. 438, 48 S.Ct. 564 (1928), and culminating in *Katz* v. *U.S.*, 389 U.S. 347, 88 S.Ct. 507 (1967) and *Berger* v. *New York*, 388 U.S. 41, 87 S.Ct. 1873 (1967), Congress passed Title III, a comprehensive act which attempts to strike an appropriate balance between the need to protect the privacy of communications and the need for effective law enforcement. This Act provides for electronic surveillance for limited purposes and with detailed safeguards. As subsequently amended, it also specifically authorizes orders directing third parties, including telephone companies, to provide assistance when those safeguards are met.

In the case at issue, the Government could have proceeded under Title III, but chose not to do so. As the number of cases pending or decided around the country indicates,[1] and as is clearly indicated in Petitioner's Brief (fn. 23, pp. 22-23), this is a deliberate policy. By seeking authority only for installation of "pen registers," instead of full wiretap permission, the Government believes it

[1] *United States* v. *Illinois Bell Tel. Co.*, 531 F2d 809 (7th Cir. 1976); *United States* v. *Southwestern Bell Tel. Co.*, 546 F2d 243 (8th Cir. 1976) petition for a Writ of Certiorari pending No. 76-1157, *Ohio Bell Tel. Co.* v. *United States*, No. 76-2627, *South Central Bell Tel. Co.* v. *United States*, No. 77-3091 (both pending before the Sixth Circuit).

need not comply with the safeguards so carefully worked out by Congress in Title III, and that it may nevertheless demand the same degree of participation from telephone companies as though it had proceeded in accordance with Title III.

Believing that an important issue of public policy is at stake, Respondent has refused to acquiesce in the course taken by the Government, but has cooperated in seeking adequate judicial guidance. Respondent does not believe that, except pursuant to Title III, it is proper for the district courts to authorize the use of pen registers by law enforcement authorities and to order third parties to provide affirmative assistance. Respondent does not believe its employees should be required to participate in criminal investigative procedures that have not been expressly authorized by the Congress or sanctioned by this Court.

Question Presented

Whether a United States district court has the authority, when the requirements of Title III have not been complied with, (1) to authorize the installation of a pen register for the surveillance of a telephone line by law enforcement officials, and (2) to order a telephone company to provide affirmative assistance in carrying out such surveillance.

Statement

As set forth in Petitioner's Brief, on March 19, 1976, Judge Tenney of the United States District Court for the Southern District of New York issued an order which authorized pen register[2] interception of two telephone lines

[2] The Government's brief, on pp. 5-6, sets forth a rather innocuous description of a pen register and its capabilities that

(footnote continued on following page)

by agents of the Federal Bureau of Investigation (FBI) and directed Respondent to furnish the FBI "all information, facilities and technical assistance necessary to accomplish the interception unobtrusively" (App. 7). The record reveals that this interception was authorized as part of an on-going FBI investigation of a gambling enterprise in alleged violation of 18 U.S.C.A. § 1952 (id. p. 1)). The affidavit submitted by the FBI special agent in support of Judge Tenney's *ex parte* order indicates that an informant identified as "Source A" had informed the FBI that the suspects had switched telephones to conduct their illegal operations and were using the telephones for which the pen register order was obtained (id. 2-4). In fact, on February 19, 1976, the Government had sought and obtained from Judge Tenney, based on information supplied by the informant, "Source A," a wiretap order pursuant to Title III for the telephone previously used by these suspects.

(footnote continued from preceding page)

states "none of the pen register devices can overhear oral communications and none can indicate whether outgoing calls are actually completed." This does not accurately describe the capabilities of a modern pen register device. The record demonstrates, other courts have realized, and indeed the Government in its brief later admits (fn. 34, pp. 23-20), once a modern pen register is installed, full wiretap capability is present simply by plugging in headphones or a tape recorder. See App., pp. 13 & 16. The Court of Appeals for the Fifth Circuit found:

> ". . . the expert testimony below indicated that once a pen register has been installed, a full wiretap 'interception' of telephone conversation may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit. *In Re Joyce*, 506 F.2d 373 at 377 (1975)."

To the same effect is Judge Lay's statement in his dissenting opinion in *United States* v. *Southwestern Bell Telephone Co.*, 546 F.2d 243 (8th Cir. 1976)

> "It is conceded by the parties that such surveillance [pen register] can be abused and that private conversations on touch-tone telephones can be intercepted." p. 250.

For a further description of the physical attributes and capabilities of a modern pen register, see pp. 19-20, *infra*.

Pursuant to this earlier order, Respondent was directed to and did supply information, technical assistance and facilities (including a leased line) to the FBI. The Government chose, in obtaining the order at issue, not to proceed under the provisions of Title III,[3] as it had in the earlier interception.

Pursuant to the March 19 Order authorizing the pen register interception, the FBI demanded that Respondent supply leased lines from East 14th Street in the Borough of Manhattan, where the two telephones to be intercepted were located, to the FBI's headquarters on 69th Street in the same borough where apparently the pen register surveillance was to take place. Respondent declined to furnish the leased lines pending further judicial consideration, since Respondent questioned the legal authority of the district court to issue the March 19 Order outside of the provisions of Title III. On March 30, 1976, Respondent filed a motion brought on by Order to Show Cause seeking to vacate or modify the March 19, 1976 Order. The district court denied Respondent's Motion and Respondent immediately appealed to the Court of Appeals for the Second Circuit. That court refused to vacate the district court's order, but authorized an appeal on an expedited basis.

The court of appeals reversed that portion of the district court's order directing Respondent to provide facilities and technical assistance. In its opinion, the court first

[3] It is interesting to note that the March 19 Order, which concededly does not comply with Title III, nevertheless contains references to various provisions thereof. For example, the order recites that the offense being investigated is one of the enumerated offenses in Section 2516 of Title 18 for which a Title III order may be obtained. The order in directing Respondent to provide assistance refers to Respondent as a communication carrier as defined by Title III (18 U.S.C.A. 2510(10)). What the order does not refer to is any authorization of the Attorney General or his designate required by 18 U.S.C.A. 2516 or the notification requirements contained in 18 U.S.C.A. 2518.

addressed the issue of whether the district court had authority to authorize surveillance of a telephone line through the use of a pen register, outside of the statutory provisions of Title III. The court found that the district court had such authority, agreeing with the rationale of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 809 (1976), that the authority to issue such an order outside of Title III could be found either in the inherent power of the district court or by analogy to Rule 41 F.R. Cr.P. In so doing, however, the court recognized that Rule 41 was not directly applicable:

> "While the electronic impulses recorded by pen registers are not 'property' in the strict sense of that term as it is used in Rule 41(b), we concur in the Seventh Circuit's suggestion that there exists a power akin to that lodged in Rule 41 to order the seizure of nontangible property. But see *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device*, 407 F. Supp. 398 (W.D. Mo. 1976)."[4] (P. App. 7a-8a)

The court next addressed the issue of whether the district court could properly order Respondent to provide technical assistance and facilities to federal law enforcement agents in placing and operating a pen register outside of the provisions of Title III. The court stated:

> "This question is of some significance not only because of its immediate impact on the Telephone Company, but also because of its broader implications regarding the power of a federal court to mandate law enforcement assistance by private citizens and corporations under the threat of the contempt sanction." (id. p. 9a).

[4] In the cited case, the District Court for the Western District of Missouri held, contrary to the majority's decision here, that Rule 41 was clearly not applicable and that a district court had no inherent authority outside of the provisions of Title III to authorize federal authorities to use a pen register. Such authority was also questioned by Judge Lay, dissenting, in *United States* v. *Southwestern Bell Tel. Co.*, *supra*.

It held that:

> ". . . in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance." (id. p. 13a).

The Court agreed with the statement of the Ninth Circuit in *Application of the United States*, 427 F.2d 639 at 644 (1970) that:

> "If the government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress."[5]

The majority expressly rejected the reasoning of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, *supra*, that the quick action of Congress in amending Title III after the Ninth Circuit decision in *Application of the United States, supra*, indicated an assumption by Congress that district courts inherently have the power to require affirmative assistance:

> "On the contrary, we think it is just as reasonable, if not more reasonable, to infer that the prompt action by the Congress was due to a doubt that the courts

[5] In this case, decided prior to the 1970 amendments to Title III (18 U.S.C. §§ 2511, 2518 and 2520) expressly authorizing a district court to require the assistance of third parties in carrying out a Title III wiretap order, the Government had urged that a district court had inherent authority to require a telephone company to provide such assistance in placing a Title III wiretap. The Ninth Circuit rejected that argument holding that, absent express statutory authorization, a federal district court was without power to compel technical cooperation by a telephone company in the interception of wire communications.

possessed inherent power to issue such orders, or that courts would be unwilling to find or exercise such power, and that in the absence of specific Congressional action, other courts would similarly reject applications by the Government for compelled compliance. In any case, as Congressional authority was thought to be necessary in Title III cases, it seems reasonable to conclude that similar authorization should be required in connection with pen register orders, especially as the two are so often issued in tandem." (id. p. 15a)

The court then went on to express its concern that a finding of inherent authority in a district court to order such affirmative assistance, without any clear statutory guidelines, was dangerous to the rights of private third parties who might be directed to aid government in its law enforcement endeavors. The court stated:

"Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties. We were told by counsel for the Telephone Company on the oral argument of this appeal that a principal basis for the opposition of the Telephone Company to an order compelling it to give technical aid and assistance is the danger of indiscriminate invasions of privacy. In this best of all possible worlds it is a law of nature that one thing leads to another. It is better not to take the first step." (id. p. 15a)

Realizing the potential danger inherent in holding that a district court can direct third parties to affirmatively assist law enforcement without any statutory basis or guidelines and mindful of the dangerous precedent for future

orders directed to third parties, the court refused to "take the first step" and hold that the district court had either inherent authority or authority under the All Writs Act to compel Respondent's affirmative assistance in this case.

ARGUMENT

I

A district court has no authority to authorize "pen register" surveillance by law enforcement except pursuant to Title III.

We are pleased that the Solicitor General agrees that the issue of the authority of a district court to authorize pen register surveillance outside of the provisions of Title III should be addressed by the Court. We believe it is entirely appropriate—indeed, necessary—for the Court to determine this underlying issue in the case at bar, as well as the power of the district court, once an order authorizing a pen register has been issued, to require a telephone company to provide facilities and technical assistance without statutory authorization. As we pointed out in our reply to the Petition for Certiorari (p. 3), "The question of the power or propriety of the issuance of the order to the Telephone Company does not arise without sanctioning, at least implicitly, the authorization of pen register surveillance outside Title III, and this Court should not do so without full consideration."

Obviously, Respondent's *direct* interest is with respect to the order issued to it. Consequently, the primary thrust of its opposition in the district court was directed to that aspect. Nevertheless, it is, as we pointed out, "somewhat inaccurate" for the issue to be presented to this Court on the basis that the orders for the pen registers are "admittedly valid." Respondent did raise the issue of validity in the court of appeals, as is evident by the ex-

tensive attention given to this point in the opinion of the court. Furthermore, the question has been raised in the other cases in other circuits (see Petition for a Writ of Certiorari, *Southwestern Bell Telephone Company* v. *United States of America,* No. 76-1157 now pending).[6]

The Government argues, and the court below found, that orders authorizing a pen register may be issued outside of the statutory provisions of Title III. This conclusion is based on (1) the definition of "intercept" contained in the statute, (2) a passing reference to pen registers in the lengthy legislative history of Title III, and (3) a statement of Mr. Justice Powell in his concurring and dissenting opinion in *United States* v. *Giordano,* 416 U.S. 505, 94 S.Ct. 1820 (1974). Both the Government and the court below ignore the fact that, prior to the enactment of Title III, Section 605 of the Communications Act of 1934 (47 U.S.C. 605) clearly prohibited the use of pen registers by law enforcement officials, and nothing in Title III specifically changes that rule. Prior to the enactment of Title III, Section 605 in pertinent part provided as follows:

> ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ."

This Court in *Benanti* v. *U.S.,* 355 U.S. 96, 78 S.Ct. 155 (1957), held that the prohibition of Section 605 was absolute and applied both to federal and state law enforcement officials. The Court emphasized that disclosure even of the existence of a communication was protected. See 355 U.S., p. 100, fns. 5 & 6. Courts faced with the express issue of

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[6] In this connection we would also point out that applications for pen register orders are made *ex parte,* and it is desirable that this point be ruled upon now rather than await a *post hoc* appeal asserting improper investigatory techniques.

whether the use of a pen register was prohibited by Section 605, because it revealed the existence of a communication, consistently held that pen registers were so prohibited. Thus, in *U.S.* v. *Guglielmo,* 245 F.Supp. 534 (1965), the court stated:

> "It is obvious from the facts that the instant unconsented use of a pen register violated the integrity of telephone communications and the clear prohibition of § 605 . . . *Nardone* v. *U.S.,* 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307." (p. 536)

In *U.S.* v. *Caplan,* 255 F.Supp. 805 (1966), the Government urged that the use of a pen register was not an "interception." The court responded:

> "[4] As an alternate basis for holding that the government made forbidden use of the pen register data, I find that an 'interception' took place under the circumstances here and that under *Benanti* v. *United States,* 355 U.S. 96, 78 S.Ct. 155, 2 L.Ed. 2d 126 (1957), no authority can permit this." p. 808

In *U.S.* v. *Dote,* 371 F.2d 176 (7th Cir. 1966), the Government urged (as the petitioner is urging here with respect to Title III), that the prohibition in Section 605 applied only to the substance of a telephone communication, and therefore the use of a pen register was permissible. The court expressly rejected this argument, stating:

> "[9] Further, we cannot pretend that the Government, while not hearing any verbal communication, did not inferentially have a reasonably good notion of the general substantive nature of the communications the pen register indicated were being initiated. In circumstances such as those in this case, knowledge of the existence of the communication is knowledge of its likely character.
>
> "[10] As the Supreme Court has said, in speaking of § 605, 'distinctions designed to defeat the plain mean-

ing of the statute will not be countenanced.' *Benanti* v. *United States*, 355 U.S. 96, 100, 78 S.Ct. 155, 157, 2 L.Ed.2d 126 (1957)." p. 181

Thus, it is clear, and Congress must have been aware, that prior to the enactment of Title III the use of a pen register by law enforcement officials was prohibited on the ground that it was an interception which revealed the existence of a telephone call.

The stated purpose of Congress in enacting Title III was to legislate comprehensively and preemptively in the area of the interception of communications. This is made clear in Section 801 of Title III in which Congress stated:

"(b) In order to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

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"(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused."

This Court in *U.S.* v. *Giordano, supra*, interpreted Congress' intent as follows:

"The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." 416 U.S. at 515.

Respondent respectfully submits that Congress' intent, as expressed in the Congressional findings and as interpreted by this Court, is to have Title III govern all interceptions of telephone communications. It is also clear that prior to the enactment of Title III the use of pen registers by law enforcement was prohibited because it was deemed to be an interception. If Congress had intended to change the existing law and permit interceptions through the use of pen registers, it must be assumed it would have done so expressly through an unequivocal statutory mandate and not by a sort of backhanded exclusion through a definition of the term "intercept." As the District Court for the Western District of Missouri stated in denying the Government's application for an order authorizing a pen register outside of Title III:

"Established principles of statutory construction require courts to recognize that Congress does not legislate in a vacuum; Congressional legislation must be viewed in light of earlier legislation enacted in connection with the same subject matter and court decisions which have definitely determined the meaning and scope of that earlier legislation. Of particular significance, so far as Congressional action in regard

to electronic surveillance is concerned, are the cases which considered whether pen register devices were within the coverage of Section 605, Title 47, U.S.C., which banned all forms of electronic surveillance. Every case which considered the precise question concluded that pen registers were embraced in the prohibition of Section 605. We believe that it must be assumed that Congress knew that pen register devices were included within the coverage of Section 605 of the Communications Act of 1934, and that it knew that unless the pen register was taken out of the ban of Section 605, the use of such a device would still be prohibited. Section 803 of the Omnibus Crime Control and Safe Streets Act amended Section 605 to clearly reflect that all electronic surveillance is now to be governed by Title III."

• • •

"It is clear that the language of Title III comprehends all forms of electronic surveillance, and the orders which the government seeks cannot be obtained independent of the procedures contained therein." *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device,* 407 F. Supp. 405 & 408.

As set forth previously, the Government and the court below ignore the stated intent of Congress and the fact that the use of pen registers by law enforcement clearly was prohibited prior to enactment of Title III. Rather, they rely on the unartful use of the word "aural" in the definition of "intercept" contained in the Act. 18 U.S.C. § 2510(4) provides:

> "(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

The Government argues that since a pen register does not hear the spoken word of a telephone communication,

it is not an interception as defined by the Act. Respondent respectfully urges that giving such controlling significance to the word "aural" ignores the clear Congressional intent set forth above to legislate comprehensively and preemptively in the area of the interception of wire and oral communications. It also severely lessens the protection provided by the definition of "contents" as used in the Act. 18 U.S.C. § 2510(8) provides:

> "(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the *existence,* substance, purport, or meaning of that communication;" (emphasis added)

The courts have consistently held that a pen register does reveal the existence of a communication.

The interpretation of the word "aural" urged by the Government would also severely lessen the protection afforded other types of communication under Title III. If the Government is correct, and Title III applies only when the communication is acquired by hearing, law enforcement would be free to wiretap teletypewriter, facsimile, and data transmissions, because the acquisition of the contents of these wire communications would not be done "aurally." This surely was not the intent of Congress.

The Government and the court below also rely on the following cryptic statement from the legislative history of Title III:

> "The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register', for example, would be permissible. But see *U.S.* v. *Dote,* 371 F.2d 176 (7th Cir. 1966)." S.Rep. No. 1097 90th Cong. 2nd Sess., 90 (1968)

A reading of *U.S.* v. *Dote,* casts doubt that by this language Congress intended law enforcement officials to be able to obtain authorization for the use of pen registers outside of Title III.

In *Dote,* a telephone company informed the Internal Revenue Service that it suspected a certain telephone was being used for bookmaking and, at the request of the IRS, installed a pen register. The company turned over to the IRS the results of the pen register without having been served with a subpoena or other judicial process. The court held that, while pen registers serve an important function in telephone company internal operations, and, therefore, their use was permissible, the release of the pen register results in that case without a subpoena was a violation of § 605 of the Communications Act. Thus, the statement in the legislative history that a pen register would be permissible, with the warning that the holding of *Dote* should be noted, would indicate that Congress was aware telephone companies used pen registers in the ordinary course of business and recognized that they could continue to do so, as long as they did not become an arm of law enforcement outside the provisions of Title III, as in the *Dote* case. Such an interpretation is clearly more consistent with the overall thrust of Title III than one that implies that Congress intended to authorize law enforcement agencies to use pen registers for investigative purposes outside of the strict requirements set forth in Title III.

Lastly, the Government and the court below rely on the following dictum contained in the concurring and dissenting opinion of Mr. Justice Powell in *United States* v. *Giordano, supra:*

> "Because a pen register is not subject to the provisions of Title III the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." (416 U.S., pp. 553-554)

In *Giordano* the Court ruled inadmissible evidence obtained through a Title III wiretap because the proper

authorization had not been obtained from the Attorney General or his specified designate. Authorization of the use of pen registers by law enforcement outside of the provisions of Title III was not an issue in the case. With all due respect to Justice Powell, this dictum should not be persuasive particularly in view of the Congressional intent set forth above that Title III apply to all interceptions and the acknowledged capability of a modern pen register to overhear conversations simply by plugging in a headphone or a tape recorder.

Realizing that there is no statutory basis for the use of a pen register by law enforcement outside of Title III, the Government states, "The authority of district judges to issue pen register orders is contained in Rule 41, Fed.R. Crm.P." But Rule 41 by its very language does not apply to pen registers. This was recognized by the court below which was constrained to find power in the district court "akin" to that provided by Rule 41. Rule 41 provides for the search and seizure of "property" which is defined "to include documents, books, papers and any other tangible objects."[7] Electronic pulses or tones sought and seized by a pen register are not included within this definition. Furthermore, in addition to the specification of tangible property as the object of the search, Rule 41 requires an inventory of the items seized and delivery of a copy of such inventory upon request to the individual from whom

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[7] The Government cites *Helvering* v. *Morgan's Inc.*, 293 U.S. 121 (1934) in support of its contention that the definition of "property" used in Rule 41 is not inclusive because of the use of the words "to include" and, therefore, covers intangible objects such as dial impulses recorded by a pen register. This Court in *Helvering* stated that the word "includes" in a statutory definition sometimes means the definition is not all inclusive, but that the entire statute must be reviewed to determine whether this was the intent of the drafters. A review of Rule 41 makes it apparent it was never intended to cover intangible property since, with respect to intangibles, it would be impossible to comply with the other provisions of Rule 41, such as inventory, delivery of the items seized, etc.

the property is seized. The order at issue here not only makes no reference to Rule 41, it also does not contain these requirements.

Respondent respectfully submits that jurisdiction to issue an order for a pen register outside of the statutory framework of Title III must be found within the provisions of Rule 41 (which, as just stated, it cannot be) or else the district courts do not possess it. Jurisdiction may not be created by analogy, by the use of terms such as "akin to." As Judge Lay stated in his dissent in *United States* v. *Southwestern Bell Telephone Company, supra:*

> "To me it is wrong that the judicial branch of government can thwart congressional intent and purpose by conjuring up some convenient, mystical authority through the pseudonym of 'inherent power.'" p. 250.

The Government, if it had chosen to do so, could have proceeded under the provisions of Title III. Indeed, as set forth earlier, the Government obtained a Title III order prior to the order at issue, involving the same crime and the same suspects and based on information supplied by the same informant. In other instances, the Government has obtained an order authorizing the use of the pen register pursuant to the provisions of Title III. *See*, e.g., *United States* v. *Finn*, 502 F.2d 938 (7th Cir. 1974); *United States* v. *Brick*, 502 F.2d 219 (8th Cir. 1974); *United States* v. *Falcone*, 505 F.2d 478 (3rd Cir. 1974), *cert. den.* 420 U.S. 955 (1975); *United States* v. *Lanza*, 341 F.Supp. 405 (M.D. Fla. 1972); *In Re Alperen*, 355 F.Supp. 372 (D. Mass. 1973).

The Government argues in footnote 23, pp. 22-23 that being able to avoid the requirements of Title III "significantly facilitates criminal investigations" and "the use of Title III procedures to obtain authorizations for the use of pen registers would substantially increase the administrative burden of law enforcement officers in a way detrimental to a fast breaking criminal investigation."

This may very well be true. But the whole purpose of Title III was to strike an appropriate balance between the need to protect the privacy of communications and the need for effective law enforcement. The very same arguments could be used to object to *any* application of Title III. But Congress has legislated otherwise, to a significant degree because of a long series of decisions by this Court concerned about the rights of individuals encroached upon by over-zealous authorities. The question, of course, is whether the widespread use of pen registers throughout the country (by state as well as federal officials), without complying with the requirements of Title III or comparable state statutes, can be squared with the statutory scheme and with individuals' constitutionally protected rights.

In considering whether authorizations for the use of pen registers outside Title III can be squared with the Congressional purpose in enacting that careful statutory balancing of interests, it is important that the court understands what is really involved as to the extent of the potential intrusion into privacy in the use of the telephone system. As the Fifth Circuit found in the case of *In Re Joyce, supra,* once a modern pen register has been installed, wiretap interception of telephone conversations may be accomplished simply by plugging in headphones or a tape recorder to the appropriate terminal on the pen register unit.

Pictures of an early version of a pen register and one of the versions now in common use, are included as Appendix A and B, respectively, of this brief. They show dramatically why the term "pen register" is a misnomer, and that authorization for the modern version would absolutely gut the statutory scheme.

Appendix A shows a primitive device capable only of recording dots, like a primitive Morse code machine. Appendix B shows an electronic decoder with numerous jacks. Once a connection of the leased telephone line is made, the

machine can print out a record of the number called, and, in addition, jacks are available for headsets to be plugged in and similarly for recording devices. Extensions could be run to still other premises.

As stated in our Reply to the Petition for Certiorari, we make no accusations. But we do submit that all the safeguards so carefully erected by Congress and the courts in the long history of dealing with this difficult subject, culminating in the Omnibus Crime Act of 1968, are incongruous, and can be readily circumvented, if the Government is to be permitted to get leased lines terminating in its private quarters without meeting the requirements of the Act.

If a district court may authorize the use of a pen register, with its inherent capacity for wiretapping, simply by satisfying a nebulous Fourth Amendment requirement, then, as the District Court for the Western District of Missouri stated, district courts would:

> ". . . have power and jurisdiction to authorize the use of pen register devices in connection with *any* investigation of *any* violation of the laws of the United States, regardless of the fact that the Congress may not have included the particular offense within the coverage of Title III." (*In the Matter of the Application of the United States of America for an Order Authorizing use of a Pen Register Device*, 407 F.Supp. 398 (1976) p. 403.)

If a federal district court has this authority outside of the statutory safeguards contained in Title III, so does any state or local court, whether or not the particular state has enacted the enabling state wiretap legislation contemplated by Title III.

Respondent respectfully submits that a review of the state of the law prior to the enactment of Title III, and Congress' stated intent in enacting Title III, lead to the

conclusion that Congress never intended to authorize the use of pen registers by law enforcement authorities, with their inherent capability of abuse, outside of the stringent statutory safeguards contained in Title III.

II

The court below was correct in holding that, absent express Congressional authorization, the district court erred in directing the Telephone Company to provide affirmative assistance.

A. Outside of Title III, there is no authority to order private parties to assist Government agents in electronic surveillance.

Regardless of whether a district court has authority to authorize law enforcement authorities to use "pen register" surveillance outside the scope of Title III, there is no authority to order Respondent, an unwilling private citizen, to assist Government agents, except pursuant to Title III. The court below, while stating that the district courts might have such power, held such orders should not issue without express Congressional authorization. The court stated that there must be concern not only with the Fourth Amendment rights of those whose telephone calls are monitored by pen register surveillance, but also with the rights of third parties, including communication common carriers, who might be called upon to aid the Government in its law enforcement endeavors.

The Government urges that the court below erred, and that district courts can properly exercise such authority under the All Writs Act (28 U.S.C. 1651(a)).[8]

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[8] The reliance on the All Writs Act is significant because the different courts ruling on the question have been uncertain as to just what they should rely upon, whether some "inherent" power or an analogy to the power given by Title III in the case of wiretaps, or even as the Government does here—which we shall respond to *infra*—a claimed peculiar status of a communication common carrier.

Both the majority and the dissent below recognized the unprecedented and far-reaching application of the All Writs Act which the Government would have this court adopt. Judge Medina, referring to the decision of the Seventh Circuit in *U.S.* v. *Illinois Bell Tel. Co., supra,* in which the Seventh Circuit held a district court has such authority under the All Writs Act, stated:

> "It appears that that was the first time a court construed the All Writs Act, or the notion of inherent judicial power, to provide justification for the entry of such an order in aid of its jurisdiction to order a search and seizure." (P. App. p. 12a)

Judge Mansfield in his dissent also recognized that the use of the All Writs Act under these circumstances is unprecedented:

> "It is true that, until the recent decision of the Seventh Circuit in *United States* v. *Illinois Bell Telephone Co., supra,* the authority granted by the All Writs Act was apparently never used to issue orders auxiliary to a search warrant." (id. p. 19a)

Judge Lay in his strong dissent in *United States* v. *Southwestern Bell Tel. Co., supra,* also noticed critically the precedential nature of the Government's position:

> "The majority's rationale is surely dangerous precedent. Judicial authority to compel a private party to assist the Government in the invidious act of electronic surveillance should be based on defined authority." p. 250

Except for *United States* v. *Illinois Bell Tel. Co., supra,* which is in fact a part of the current controversy which brings this matter to this Court, none of the cases cited by the Government for the proposition that a district court has authority under the All Writs Act to compel an unwilling third party to affirmatively assist law enforcement actually support the Government's position. Even the

Eighth Circuit in *United States* v. *Southwestern Bell Tel. Co., supra,* did not rely on the All Writs Act to find such power, rather it held the power was inherent.

The Government's inability to find judicial support for the interpretation of the All Writs Act it would have this Court adopt is not surprising. The courts which have ruled on the issue have consistently held that the All Writs Act is not an independent source of jurisdiction. The Seventh Circuit in interpreting the Act stated:

> "This provision does not enlarge or expand the jurisdiction of the courts but merely confers ancillary jurisdiction where jurisdiction is otherwise granted and already lodged in the court . . . The statute presupposes existing complete jurisdiction and does not contain a new grant of judicial power." *United States* v. *First Fed. S. & L. Ass'n,* 248 F.2d 804, 808-09 (7th Cir. 1957) cert. denied 355 U.S. 957 (1958).

See also *Brittingham* v. *United States Commissioner of Internal Revenue,* 451 F.2d 315 (5th Cir. 1971) where the court stated at page 317:

> "It is settled that this section, known as the All Writs Act, by itself, creates no jurisdiction in the district courts. It empowers them only to issue writs in aid of jurisdiction previously acquired on some other independent ground."

The Government contends that it is not relying on the All Writs Act as an independent jurisdictional basis for the district court's order. It states that the jurisdictional basis is supplied by Rule 41 F.R.Cr.P., that the order to Respondent is necessary to effectuate the underlying order and, therefore, is authorized by the All Writs Act (fn. 29). The fallacy in the Government's argument, and the issue which it does not address, is what is the basis of the district court's jurisdiction over respondent, an unwilling third party not before the court, to require it to affirma-

tively assist in implementing the court's order. The All Writs Act provides that district courts shall have the power courts customarily have, i.e., "agreeable to the usages and principles of law" to carry out the responsibilities given them. It is not an independent source of jurisdiction, and by itself cannot provide the necessary jurisdiction over Respondent. The Government's contention that the All Writs Act by itself provides a district court such jurisdiction over a third party is unprecedented and the cases cited by the Government, far from supporting this assertion, merely serve to point up the unprecedented nature of the power the Government is asserting here.

In *Board of Commissioners of Knox County* v. *Aspinwall,* 24 How. 376 (1860); *Clark Equipment Co.* v. *Armstrong Equipment Co.,* 431 F.2d 54 (5th Cir. 1970); *Weber* v. *Lee County,* 6 Wall 210 (1867); and *Stern* v. *South Chester Tube Co.,* 490 U.S. 606, 20 L.Ed. 2d 177 (1968), the courts' orders were all directed to parties actually before the court, directing them to perform duties which they clearly were required to perform by applicable statute and where there existed a clearly defined right in the petitioner to have such duties performed.

In Board of Commissioners of Knox County, the Commissioners of a county had issued bonds and then neglected or refused to levy the necessary taxes. The Commissioners were the defendants, they were the ones at fault, and all the court did was order them to do their clear duty. No order to a third party not involved in the controversy was at issue.

Weber v. *Lee County,* involved the same type of fact situation—bonds not paid and a court-ordered levy. The court said that its order became the substitute for the ordinary process of execution to enforce the judgment.

In *Clark Equipment Company* v. *Armstrong Equipment Company,* the defendant had defaulted on a debt secured

by road building equipment which was scattered through five states. The security agreement obligated the debtor to assemble the equipment. The court held that it had the power to issue an order to the defendant debtor directing that the equipment be assembled. Again, the only use of the court's writ was against the defendant who had a clear obligation to the petitioner. The question involved was purely a technical one as to whether the federal court was limited to the relief an Alabama court could provide. It was held that it was not so limited, but could provide relief covering all five states in aid of its jurisdiction.

Stern v. *South Chester Tube Company,* is perhaps closest in point to the case at bar, but, even so, is radically different in its facts and clearly distinguishable. At issue was the question of whether a federal court should issue an order in the nature of mandamus if that was the only relief sought, as distinguished from being "in aid of" the securing of other relief as to which the court independently had jurisdiction. The Court held that previous distinctions between mandamus and mandatory injunctions were no longer meaningful, and that it had power to order the inspection of corporate records in a diversity case. It did so because there was a specific state statute authorizing such relief. No statute authorizes the relief sought by the Government here. The only statute providing a comparable right (Title III) was not used. If the Government had followed that statute, or, if a new statute is enacted creating the right, there would be no question raised as to the availability of the remedy.

As the Government concedes, outside of Title III there is no express statutory authority which provides that unwilling third parties, such as Respondent, may be directed to affirmatively assist law enforcement in effecting a pen register interception. The Government's position that the All Writs Act provides such authority, absent an independent statutory mandate, is not supported by the cases it cites.

The Government's position also is not supported by the cases cited by Judge Mansfield in his dissent below[9] (Pet. App. 18a-19a).

In *Adams* v. *U.S. ex rel. McCann*, the circuit court issued a writ of *habeas corpus* to perfect its jurisdiction over the appeal of an indigent *pro se* defendant who waived his right to a jury trial in the district court. The defendant was incarcerated at the time and the circuit court found this severely inhibited the appeal.

In *Hamilton* v. *Nakai*, the district court's order was directed to one of two Indian tribes who were parties before the court to determine the rights of the respective tribes in reservation land. The court's order was directed to the losing tribe to implement the court's decision. Similarly in *Mississippi Valley Barge Line Co.* v. *United States*, the losing party in a prior proceeding before the same court sought to frustrate the decision of the court by a deceptive transfer of the license at issue to another entity involving the same principals as the original defendant. Here again, the court's order was directed, in effect, to one of the parties already before it to enforce the court's decision.

In the *Georgetown* case, a hospital brought an action against respondent whose wife was critically ill and required blood transfusions. Respondent had refused to grant permission for the transfusions on religious grounds.

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[9] *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942); *Hamilton* v. *Nakai*, 453 F.2d 152, 157 (9th Cir.), *cert. denied*, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed. 2d 332 (1972); *Mississippi Valley Barge Line Co.* v. *United States*, 273 F.Supp. 1, 6 (E.D.Mo. 1967), *aff'd mem.*, 389 U.S. 579, 88 S.Ct. 692, 19 L.Ed.2d 779 (1968); *Board of Education* v. *York*, 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 968, 28 L.Ed.2d 237 (1971); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *rehearing en banc denied*, 118 U.S.App.D.C. 90, 331 F.2d 1010, *cert. denied*, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964); *United States* v. *Field*, 193 F.2d 92, 95-96 (2d Cir.), *cert. denied*, 342 U.S. 894, 74 S.Ct. 202, 96 L.Ed. 670 (1951).

The court, in order to maintain the *status quo*, issued an order allowing such transfusions as might be necessary to save the wife's life until the ultimate issue between the hospital and respondent could be determined by the court. Here also, the court was preserving its jurisdiction by an order directed to one of the parties already before it.

In *United States* v. *Field*, the district court held in contempt bail fund trustees who refused to answer questions concerning the whereabouts of fugitives for whom the trustees had posted bail. The court of appeals upheld the district court basing its action on the unique relationship between one who posts bail and the criminal defendant for whom it is posted. The court held one who posts bail is responsible for the appearance of the defendant and has voluntarily entered into a contract with the court thus providing jurisdiction.

Thus, the cases set forth above stand for the obvious proposition that a court may issue to parties actually before it, or, as in the case of *Field*, to one who has voluntarily incurred a responsibility to the court, all necessary orders to preserve and implement the court's jurisdiction.

In *Board of Education* v. *York*, respondents insisted on sending their child to a particular school in violation of a Board of Education directive, issued pursuant to a court-ordered integration plan, that respondents' child should be sent to another school. After respondents had repeatedly violated the Board of Education's directive, the district court issued an injunction prohibiting respondents from sending their child to the first school and further provided that if the child was to continue in the school system, he should attend the school designated by the Board. The essential difference between this case and the case at bar is that respondents repeatedly flouted the directives of the Board of Education which had been issued pursuant to the court's order. Thus, respondents through their affirmative action were attempting to interfere with the implementation of the court's order. It is obvious that a district

court has the authority to issue an injunction against those who, rather than challenging the court's order through the judicial process, take affirmative steps in an attempt to frustrate the court's mandate. This clearly is not the case at bar.

Thus, neither the Government nor Judge Mansfield in his dissent below, have been able to cite any decisional authority to support the Government's position. This is significant for, despite the fact that the All Writs Act is one of our most ancient statutes, the Government has not been able to show that "agreeable to the usages and principles of law" a district court, without underlying statutory authority, has the power peremptorily to order a third party, not before the court, to aid in carrying out its orders.

It is not sufficient just to assume that if the court's order would be incapable of execution but for the assistance of a third person, such person can be ordered to assist. *Cf. Iowa City Montezuma Railroad Shippers Ass'n* v. *United States,* 338 F.Supp. 1383 (D.C. Iowa 1972). In the absence of applicable laws creating a duty, even parties before the court are not subject to peremptory orders such as the one at issue here. The order in this case is in the nature of a peremptory writ of mandamus. Such writs should not issue unless the court clearly has jurisdiction of the subject matter, jurisdiction over the person to whom the order is directed, and there is a clear duty owing on the part of that person. The Sixth Circuit in *United States* v. *Battisti,* 486 F.2d 961 (1973) set forth the standard established by this Court for this type of writ as follows:

> "Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory. *United States ex rel. McLennan* v. *Wilbur,* 283 U.S. 414, 51 S.Ct. 502, 75 L.Ed. 1148; *United States ex rel. Girard Trust Co.* v. *Helvering,* 301 U.S. 540, 57 S.Ct. 855, 81 L.Ed. 1272, *Rayborn* v. *Jones,* 6 Cir., 1960 282 F.2d 410." p. 964

None of these elements is present in the case at bar.

The first case in which the Government sought the extraordinary type of affirmative asistance it seeks here without statutory authorization was in *Application of United States,* 427 F.2d 639 (9th Cir. 1970), and the court ruled against the Government in no uncertain terms. In that case, the Government had obtained a valid Title III wiretap order and sought to have the district court direct the Central Telephone Company of Nevada to provide affirmative assistance to the FBI in carrying out the wiretap.[10]

The Government contended there, as it does now, that the district court must have such authority or the FBI would be frustrated in its investigation and unable to effect the interception. The Ninth Circuit rejected this argument stating:

> "It may or may not be true that, in this particular case, it is an absolute impossibility for the Federal Bureau of Investigation to effectuate the desired interception for which approval was sought without the active assistance of the company. But it is common knowledge that there can be, and frequently has been, wiretapping of telephone lines without the assistance or even the knowledge of the telephone company.
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> • • •
>
> "We are not convinced that the authority which the Government would have the court exercise, to compel a telephone company to assist in the investigation of suspected law violators can be derived, by analogy,

[10] This was prior to the enactment of the 1970 amendments to Title III (18 U.S.C. §§ 2511, 2518 & 2520) expressly authorizing a district court to require the assistance of third parties in carrying out a Title III wiretap order.

from the power law enforcement officers may have to assemble a *posse comitatus* to keep the peace and to pursue and arrest law violators. Nor do we find, outside Title III, any district court authority, statutory, or inherent, for entry of such an order. We think the district court correctly decided that it was without power to grant the relief requested." 427 F.2d at 643, 644.

Thus, the Ninth Circuit as well as the Second Circuit has held that if the Government must have the right to compel affirmative assistance from third parties, it should address its plea to Congress.[11] After the Ninth Circuit decision, the Government did apply to Congress for such express statutory authority and Congress promptly amended Title III to provide for such assistance as follows:

> "It shall not be unlawful *under this chapter* for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, *pursuant to this chapter* (18 U.S.C. §§ 2510-2520), is authorized to intercept a wire or oral communication." 18 U.S.C. 2511(2)(a)(ii) (Emphasis added).

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[11] The Government has not done so since the 1970 Amendments to Title III. It is Respondent's understanding that in response to requests from both the National Wiretap Commission and the Congress to recommend changes in Title 18, Ch. 119, the Department of Justice has not requested that the courts be statutorily empowered to direct telephone company assistance in pen register situations. For example, on July 27, 1975, before the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Mr. James Reynolds of the General Crimes Section of the Criminal Division, on behalf of the Department of Justice, submitted several suggestions for changes in Title III; however, the pen register question was not raised. (Commission Hearings, Volume II, pp. 1478-1509).

The Government, realizing that by the plain language of the amendment Congress authorized such assistance only in connection with an order issued pursuant to Title III, urges that this amendment simply reflects what Congress had previously intended in enacting Title III. Judge Lay commenting on this position in *U.S.* v. *Southwestern Bell Tel. Co., supra,* states:

> ". . . this reasoning is difficult to follow. It provides an innovative explanation, but certainly a strange and new principle in the area of statutory construction. I always thought it was a fundamental rule of statutory construction that Congress does not legislate needlessly." (p. 248)

Nor does the Government's reference to the legislative history of the amendments support its position that Congress was simply recognizing that courts implicitly had this power. In 115 Cong. Rec. 37192 (1969) (Senator McClellan) and 115 Cong. Rec. 37193 (1969) (Senator Tydings), the Senators stated that, in enacting Title III, Congress intended that telephone companies who voluntarily assisted law enforcement officials in Title III interceptions should be immune from liability. There is absolutely no reference to the power of a district court to order such assistance prior to the 1970 amendments, or that such amendments were being made solely to confirm an existing right.

The further fallacy in the Government's position is that even if Congress considered that such power to provide affirmative assistance was implicitly contained in Title III prior to the 1970 amendments, it certainly does not follow that Congress intended district courts to have this implicit authority where the underlying order authorizing the electronic interception is not issued pursuant to Title III.

B. No different rules apply to a telephone company than to other private citizens.

In an attempt to avoid the logical implications for third parties in general of its interpretation of the All Writs Act, the Government seeks to create a different status for Respondent as a telephone company. Before turning to the logical weaknesses in that contention, it should first be pointed out that the Congress drew no such distinction in enacting the 1970 amendments to Title III. Those amendments authorize orders to be issued to "a communication common carrier, landlord, custodian or other person."

The Government contends that Respondent, as a common carrier, cannot pick and choose whom it will serve, and that, therefore, the Government has a *right* to have leased line service and mandamus should lie. This argument begs the question. True, if the Government had a lawful right to the lines it sought, Respondent had no discretion to refuse it. But the issue is whether, in fact, the Government does have a lawful right to be provided a line to be connected to a line of a telephone customer without such customer's knowledge and consent. This is not a service covered by the company's tariffs. If it were, it would be available to all without discrimination, and surely the Government does not contend that such is the case. Respondent, pursuant to tariff, offers private line service between telephones of the same customer or between two or more customers where all the customers consent. Thus, the Government's argument that it is merely seeking to be a subscriber to a public service offering of Respondent is demonstrably erroneous. If, as Respondent believes, the order at issue is invalid, Respondent is not justified in providing a private line to be connected with another customer's service without that customer's consent.

There is no validity to the Government's argument on page 28 that "the Court of Appeals was bound to rule on the case before it, not on some hypothetical future case"

and that "it was required to decide only whether the district court could properly order the telephone company, not some other private individual, to provide assistance . . ." There is no basis for making a special category out of telephone companies by judicial fiat. They are private citizens with the same rights and responsibilities as other private citizens, except insofar as they have additional duties or responsibilities created by statute. Cf. *United States* v. *Goldstein*, 532 F.2d 1305 (9th Cir. 1976); *Matter of Leitner* v. *New York Telephone Co.*, 277 N.Y. 180 (1938).

The Government's assertion of power in a district court to require a private third person to assist in carrying out the court's orders without a statutory basis therefor is unprecedented. Once the course of directing orders to private third parties is embarked upon, there are no guidelines.

C. Even if a district court has the power to order private citizens to assist in carrying out their orders, given the potential consequences for citizens in general, the court below appropriately exercised its discretion to prohibit the entry of such orders in the absence of Congressional authorization.

While Respondent believes, in accordance with the foregoing, that the Government should fail both because (1) a district court has no authority to issue the underlying "pen register" order, and (2) even if it does, it has no power to order unwilling third persons to become actively involved in carrying out its order, there is a further, and ultimate, question reached by the court below: given the extremely sensitive nature of the matter and the implications for the rights of citizens generally, *should* orders of assistance be issued *even if* the power exists to do so, absent specific Congressional action. We submit that the majority below was correct in holding it was an abuse of discretion to do so.

Much of the discussion and the authorities heretofore cited are apposite here and will not be repeated. As stated, courts and legislatures have wrestled for several decades with the very difficult problems of balancing the rights of individuals with the needs of law enforcement insofar as electronic surveillance is concerned. Title III was enacted as a comprehensive carefully balanced scheme. The widespread use of "pen registers," and certainly the use of modern electronic decoders, were at the very least not specifically dealt with. Secondly, mandated provision of facilities and technical assistance by communications common carriers also was not dealt with. Congress, following the Ninth Circuit's opinion in *Application of the United States,* 427 F.2d 639 (1970) acted to authorize mandated assistance by private citizens, including carriers, but only within the context of Title III with its carefully balanced scheme. Since the Government reads pen register orders *out* of Title III, it should not be heard simultaneously to contend for orders against common carriers *as though* it were proceeding under Title III.

The most disturbing aspect of the Government's position is its claim that all the district courts—and since it only claims for them power "agreeable to the usages and principles of law" all state courts—can, without statutory specification, direct orders to private citizens to participate in law enforcement without the extent of such power being spelled out in clearly defined statutes.

A policy with respect to "pen registers" can be enacted if that is the judgment of the people's elected representatives. Assistance of communications common carriers can be mandated if that is deemed desirable. But the asserted power against all private persons is unlimited in scope. It is one thing for courts to act to prevent an obstruction of their orders; it is quite another to dragoon unwilling private parties into affirmative participation.

We, therefore, commend to the Court's judgment the position taken by the majority below. Even if the Court does not conclude (as we think it should) that there is a lack of power in the district courts to issue the orders complained of, it should hold that it is an abuse of discretion to do so in this most sensitive area, where Congress has legislated comprehensively, without specific additional action by the Congress.

Conclusion

For the reasons set forth above, the judgment of the court of appeals should be upheld insofar as it provides that the district court erred in directing Respondent, outside of the provisions of Title III, to provide affirmative assistance to law enforcement in placing a pen register. The judgment of the court of appeals should be reversed insofar as it provides that a district court has authority to authorize use of a pen register by law enforcement, outside of the provisions of Title III.

Respectfully submitted,

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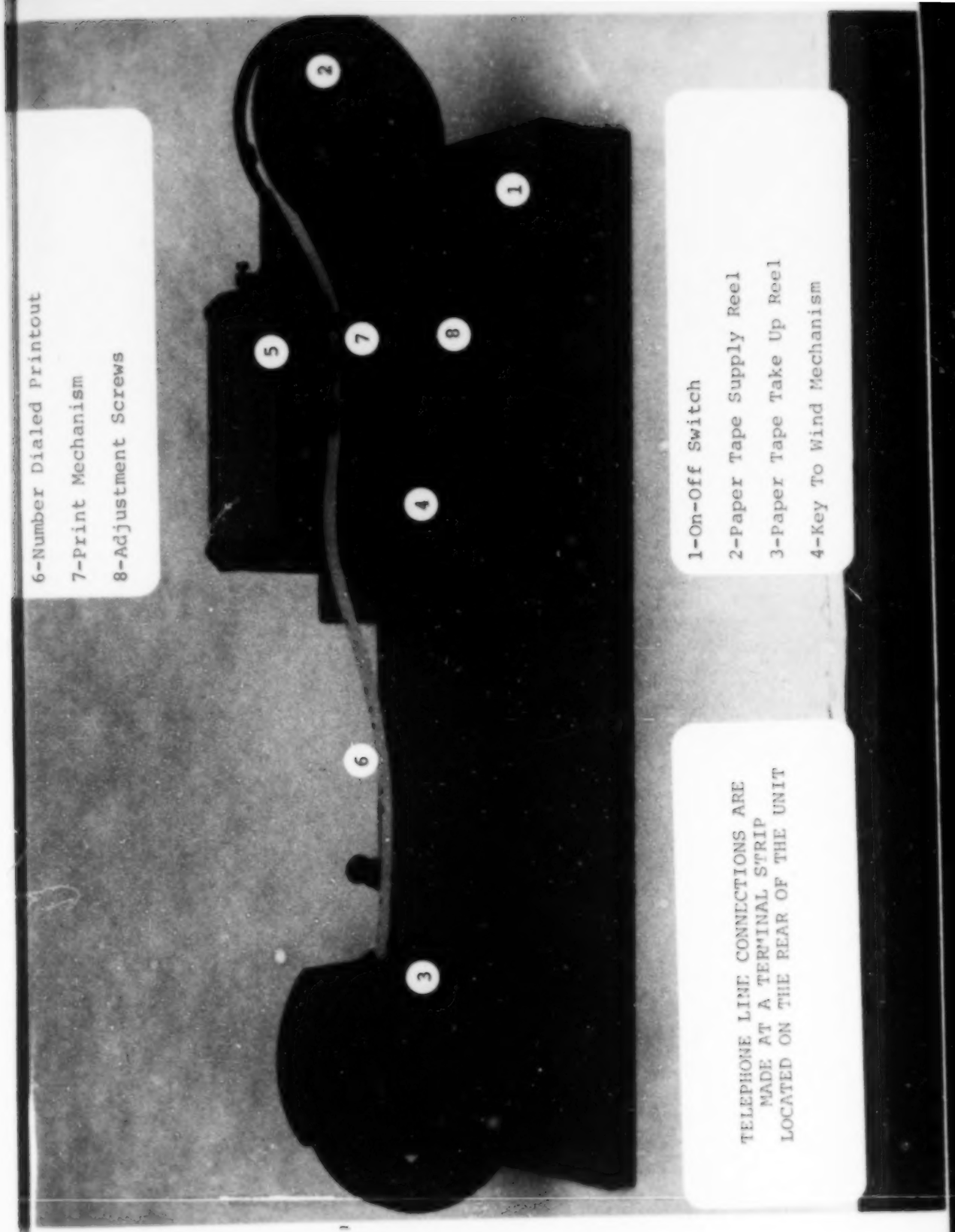
Appendix A, Photograph, Early Version of a Pen Register

(See opposite ☞)



Appendix B, Photograph, Modern Version of a Pen Register (Electronic Decoder)

(See opposite ☞)